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No. 86-546

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NEW ORLEANS PUBLIC SERVICE INC.,
Petitioner,

v.

THE CITY OF NEW ORLEANS, *et al.*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF FOR THE CITY OF NEW ORLEANS, ET AL., IN OPPOSITION TO THE PETITION

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QUESTION PRESENTED

Had this case not been rendered moot by a negotiated settlement, it would have presented the following question: Where an electric utility asserted a claim of federal preemption in seeking to enjoin an ongoing state regulatory proceeding that was needed to address complex issues of deep concern to the local community and had not yet ripened into an agency decision, could the federal court exercise discretion to abstain from adjudicating the preemption claim, recognizing that state courts were competent to provide swift review of issues arising under both federal and state law?

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BRIEF FOR THE CITY OF NEW ORLEANS, ET AL., IN OPPOSITION TO THE PETITION

OPINIONS BELOW

The first opinion of the Court of Appeals is reported at 782 F.2d 1236. The amended opinion of the Court of Appeals is reported at 798 F.2d 858. The opinion of the District Court for the Eastern District of Louisiana is unpublished. Each of these opinions is reprinted in the appendix to the petition.

JURISDICTION

Before the Eastern District of Louisiana and the Fifth Circuit, NOPSI asserted claims based on the Commerce Clause, the Supremacy Clause, the "Preemption Doctrine," and the Federal Power Act, 16 U.S.C. § 791-828c (1982), and invoked federal jurisdiction under the Federal Power Act, 16 U.S.C. § 825p

(1982), and 42 U.S.C. § 1983 (1982). Before this Court, NOPSI asserts jurisdiction under 28 U.S.C. § 1254(1) (1982 & Supp. III 1985).

STATEMENT OF THE CASE

The City of New Orleans is a municipal corporation existing under the laws of the State of Louisiana and its Home Rule Charter. The Council of the City of New Orleans (the "Council") exercises all legislative powers of the City, and also is empowered under state law to regulate the rates and other activities of public utilities serving New Orleans.[1] Petitioner, New Orleans Public Service Inc. ("NOPSI"), is a member of the Middle South System[2] and is engaged in the retail sale of electricity to consumers in New Orleans.

This case arises from the efforts of the Council, in the exercise of its undisputed regulatory authority over NOPSI's retail rates, to address and, if possible, to mitigate the severe "rate shock" effect[3] to the New

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[1] The individually named respondents served as members of the Council at the time this action was instituted. The Council is on an equal plane with the Louisiana Public Service Commission in regulating public utilities, but the responsibility of each body is geographically different.

[2] Middle South Utilities, Inc. ("MSU") is an investor-owned public utility holding company, the wholly-owned operating subsidiaries of which include NOPSI, Arkansas Power & Light Company ("AP&L"), Louisiana Power & Light Company ("LP&L") and Mississippi Power & Light Company ("MP&L"). Another wholly-owned subsidiary of MSU, Middle South Energy, Inc. ("MSE") (now System Energy Resources, Inc.), owns an undivided 90% interest in the nuclear power plant involved in this case, the remaining 10% of which is owned by non-Middle South interests.

[3] NOPSI sought an immediate rate increase of $168 million

Orleans community threatened by NOPSI's participation in the costly Grand Gulf nuclear project, located near Port Gibson, Mississippi. NOPSI brought this action in the District Court prematurely, before the Council had an opportunity to rule on the merits of the company's retail rate application. NOPSI now seeks review by this Court despite the fact that the issues raised by the complaint were rendered moot through a March, 1986 settlement between NOPSI and the Council. But for the settlement, the narrow issue presented would be whether the District Court, in the circumstances of this case, abused its discretion by invoking federal abstention to permit the local regulatory proceedings to be completed and the matter to be reviewed by the state courts.

The Grand Gulf project is, by any measure, a commercial failure. Grand Gulf Unit I originally was projected to cost approximately $600 million, and entered commercial operations in July 1985 at a cost in excess of $3.6 billion. Construction of a second Grand Gulf unit has been suspended, with approximately $1 billion spent and the unit likely to be cancelled. NOPSI became involved in the Grand Gulf project in 1974 when, without informing its local regulator, it entered into the first of a series of private agreements with

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annually, which would have resulted in an abrupt rate increase of approximately 50-60%. Evidence before the Council showed that such a dramatic increase in electric rates would have caused substantial hardship, loss of jobs, decline of business and increase of poverty in New Orleans, already one of the poorest cities in the country. The settlement ultimately adopted by NOPSI and the Council moderated the rate increase in a manner similar to that employed in similar circumstances by state regulatory authorities throughout the country, with annual increases limited to about 6% under a multi-year "phase-in" plan.

the other Middle South operating companies whereby they guaranteed indebtedness for the construction of the plant and agreed to purchase indeterminate portions of its output.[4]

In the early 1980's, agreements addressing the allocation of Grand Gulf I capacity, energy and expenses among the Middle South operating companies, as well as sales of power and energy by and between the operating companies generally, were filed with the Federal Energy Regulatory Commission ("FERC"), which has exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce. After extensive proceedings, the FERC issued its Opinion Nos. 234 and 234A,[5] which adopted a formula to allocate the wholesale costs of Grand Gulf I among NOPSI and its much larger operating company affiliates, as follows: AP&L—36%; LP&L—14%; MP&L—33%; NOPSI—17%.

The FERC did not address the need to moderate the Grand Gulf rate increase at the local level through "phase-in" plans, nor did it determine the appropriate allocation of the increase among different classes of retail ratepayers ("rate design"). The FERC likewise

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[4] The Council first became cognizant of the potential impact of Grand Gulf on NOPSI and New Orleans in September 1980. At that time, NOPSI's chief executive officer assured the Council, under oath, that New Orleans would not have to pay for Grand Gulf should the Council deem it inappropriate, and that NOPSI would instead sell its power to other utilities.

[5] *Middle South Energy, Inc.*, 31 F.E.R.C.(CCH) ¶ 61,305 ((1985) (Opinion No. 234) and 32 F.E.R.C.(CCH) ¶ 61,425 (1985) (Opinion No. 234-A), *appeal docketed sub nom., Mississippi Industries v. FERC*, Nos. 85-1611 *et al.* (D.C. Cir. filed Sept. 26, 1985).

did not address the "prudence" of any entity's participation in Grand Gulf (either that of the wholesale seller, which incurred significant cost overruns, or that of the operating company purchasers, which might have taken steps to limit their exposure to Grand Gulf). In sum, the FERC did not, and did not purport to, preempt retail regulatory bodies from addressing issues bearing upon the manner, timing or magnitude of the retail rate increases required as a result of Grand Gulf.[6]

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[6] The FERC recognized the role of the States in the regulation of the Middle South operating companies:

> [W]e concurred in [Judge Head's] discussion of the need to balance Federal and State interests in exercising our jurisdiction. Furthermore, we think our opinion, taken as a whole, as well as Judge Head's discussion, which we adopted, clearly recognize the role of the States in regulating retail electric rates and the need to balance overlapping State and Federal electric rate jurisdiction.

32 FERC at 61,952.

On the issue of prudence, the then-Acting Chairman of FERC subsequently testified in a congressional hearing:

> The Commission did not determine the prudence of the purchase of power by the Middle South utilities from the Grand Gulf Nuclear Generating Station in Opinion Nos. 234 and 234-A.

See Prepared Testimony of the FERC Before Subcommittee on Energy, Conservation and Power, of the House of Representatives Committee on Energy and Commerce, Hearing on Prudence Reviews (March 14, 1986). Moreover, the FERC administrative law judge who heard the matter, confronted with the suggestion by Middle South attorneys that he should make some type of implicit prudence findings, repeatedly stated "I'm not getting into that," and indicated that he could not prevent the issue from being litigated in a state forum. F.E.R.C. Docket No. ER82-616-000, Tr. 228, 235-36, 248-51 (Mar. 14, 1983). The

On May 17, 1985, NOPSI filed an application with the Council seeking to recoup Grand Gulf costs through a formula-based increase in its retail rates. The application was filed a month before the FERC determined NOPSI's allocation of Grand Gulf costs and just two days after the Council reacquired regulatory authority over NOPSI (which had been vested in the Louisiana Public Service Commission for a period of four years). The Council promptly advised NOPSI of the need to conform its application for permanent rate relief to certain standard filing requirements, but also invited NOPSI to make an abbreviated request for interim rate relief and pledged expedited treatment.

Rather than requesting interim relief, NOPSI commenced this action on August 2, 1985, seeking preliminary and permanent injunctive relief and damages against the City, the Council and its members individually. After hearing live testimony on August 12, 1985, the District Court denied preliminary relief and directed NOPSI to seek interim rate relief from the Council.

Following expedited hearings on NOPSI's request, the Council, on September 5, 1985, granted interim relief which it found would strike an equitable balancing of the interests of NOPSI, its stockholders and ratepayers, and would permit NOPSI to meet its Grand Gulf obligations and remain solvent through

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District Court in this case found that a mandate for state regulatory authorities to immediately pass Grand Gulf-related expenses through to retail ratepayers was "conspicuous by its absence" from the FERC's opinion (Pet. at A-43), and another federal court contemporaneously reached a similar conclusion. *See* note 22, *infra*.

accelerated Council proceedings on the request for permanent rate relief. The Council (a) granted NOPSI $28.3 million of interim rate relief; (b) directed NOPSI to recover $32 million of excess advance payments made to MSE, part of approximately $67 million in total advance payments made by NOPSI; (c) reaffirmed a prior authorization for NOPSI to issue $35 million in new debt securities; (d) specified that NOPSI could recover, with interest, the amount of relief finally determined to be proper, for the period of the Council's deliberations; and (e) invited NOPSI to seek additional interim relief as necessary. NOPSI immediately requested certain changes in the interim rate order, but returned to the District Court before the Council could act on that request and again sought permanent injunctive relief mandating an unmoderated and immediate pass-through of all Grand Gulf costs.

The District Court dismissed the action on September 16, 1985, finding that the Johnson Act, 28 U.S.C. § 1342 (1982), deprived it of jurisdiction and that, in any event, it should abstain from exercising jurisdiction under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). The court emphasized that the Council had not yet addressed the issue of NOPSI's request for a permanent rate increase, and found, based on the extensive evidence submitted, that the Council was acting responsibly and was "determined to assist NOPSI in maintaining a positive cash position by pursuing a number of feasible alternatives." (Pet. at A-46).[7]

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[7] As matters developed, NOPSI did remain in a positive cash position, never sought additional interim relief from the Council,

On appeal by NOPSI, the Fifth Circuit initially reversed the District Court on February 14, 1986, holding that the Johnson Act did not defeat federal jurisdiction in this case and further holding (in a terse discussion) that the lower court erred in abstaining. On March 20, 1986, NOPSI and the Council entered into a comprehensive settlement of the permanent rate application that was the subject of this litigation, the terms of which were published in Council Resolution No. R-86-112. The settlement provides, *inter alia*, that NOPSI's shareholders will absorb $51.2 million of Grand Gulf I costs and that remaining costs (with interest) will be recovered from retail ratepayers under a phase-in plan designed to avoid the adverse effects of "rate shock."[8]

Although the settlement is subject to the resolution of certain other issues involving ongoing or potential litigation between the parties,[9] it does resolve the

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and was able to meet each monthly payment on its Grand Gulf obligation through and beyond the date of the March 1986 settlement.

[8] The settlement is similar in many respects to settlements entered into in other jurisdictions by AP&L, LP&L and MP&L, each of which agreed to moderate the retail rate impact of Grand Gulf and to absorb, in some fashion, a portion of the expenses allocated to it by the FERC. (In other parts of the country, local regulators and their jurisdictional utilities have struck similar compromises designed to deal with the effects of high cost nuclear plants.)

[9] Among the issues not resolved by the settlement was the prudence of NOPSI's conduct with respect to Grand Gulf, including the company's failure to sell off all, or some portion of, its Grand Gulf allocation in order to reduce its cost exposure. NOPSI's prudence is the subject of an ongoing Council investigation, which was instituted on October 10, 1985, *after* the

issues raised by the instant complaint and obviate the relief sought by NOPSI in this action. Indeed, in *NOPSI II* the company recently made the following admission with respect to the issues that were contested in this action and addressed by the settlement:

> First, plaintiffs do not contest the Council's regulatory jurisdiction over retail rates. Nor do they contest the Council's right to determine traditional ratemaking issues such as the cost of capital, rate-base, rate of return on rate-base, and allocation of rates among customer classes. Plaintiffs also do not contest the Council's right to determine whether the FERC-allocated Grand Gulf 1 costs can be offset in whole or in part by savings in other areas. Finally, plaintiffs do not contest the Council's right to work with NOPSI to determine how the Grand Gulf 1-related costs can best be phased-in. (*Indeed, all of these traditional retail rate issues have already been resolved*). (emphasis added)[10]

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instant action was dismissed. Neither the District Court nor the Fifth Circuit had occasion to consider the issue of prudence in this case. Instead, NOPSI and MSE filed a *second* federal complaint challenging the Council's authority to conduct a prudence investigation. Civil Action No. 85-5273, *Middle South Energy, Inc., et al. v. City of New Orleans, et al.* (E.D. La. filed November 14, 1985) ("*NOPSI II*"). *NOPSI II* currently is the subject of a motion to dismiss on the grounds of, *inter alia*, lack of ripeness, failure to exhaust administrative remedies, and abstention. Assuming dismissal of *NOPSI II*, NOPSI will still have an opportunity to seek judicial review of the Council's final decision on prudence, which is expected to be issued at or near the end of 1986.

[10] A copy of this NOPSI pleading has been lodged with the Court.

The Council, in turn, publicly has stated that its regulatory proceedings would not seek to invalidate any FERC-approved agreement relating to Grand Gulf I or order NOPSI to pay MSE a wholesale rate other than that determined by the FERC through its allocation.

The Fifth Circuit withheld issuance of the mandate following its February 14, 1986 opinion and, on June 10, 1986, advised the parties that it was contemplating revision of its treatment of abstention, requesting letter briefs on this issue. On September 2, 1986, the Fifth Circuit issued an order withdrawing Part IV of its earlier opinion and substituting a new Part IV, which concluded that "the district court's decision to abstain on the instant facts was a proper exercise of discretion." (Pet. at A-24.) The Fifth Circuit found that abstention was proper under both *Burford* and *Younger v. Harris*, 401 U.S. 37 (1971).[11]

REASONS FOR DENYING THE PETITION

I. THIS ACTION HAS BEEN RENDERED MOOT BY SETTLEMENT OF THE RETAIL RATE PROCEEDING

The issue NOPSI seeks to have this Court decide—whether the District Court erred in abstaining in the face of a claim of federal preemption—has been rendered moot by the March 1986 settlement of the retail rate proceeding before the Council. The essence of

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[11] The letter brief submitted by the City had informed the Fifth Circuit of the settlement, and the NOPSI letter brief specifically addressed the issue of mootness. The Court, however, did not discuss the settlement or address the issue of mootness, and simply revised the prior opinion issued in February.

NOPSI's preemption claim was that, in the wake of the FERC's allocation of Grand Gulf costs at the wholesale level, the Council had no lawful retail rate-making functions to perform and was obligated simply to implement a full and immediate pass-through of wholesale costs to retail customers. NOPSI's preemption claim did not survive the settlement, which addressed the very matters NOPSI had contended were beyond the Council's jurisdiction and, with NOPSI's concurrence, fashioned a comprehensive plan for recovery of Grand Gulf costs in retail rates. As NOPSI itself recently acknowledged in *NOPSI II*, "all of these traditional retail rate issues have already been resolved." Thus, review by this Court of the District Court's determination to abstain would serve no purpose and would not affect the rights of the parties.

This Court has held that it is the duty of federal courts "to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Local No. 8-6, Oil, Chem. & Atomic Workers v. Missouri*, 361 U.S. 363, 367 (1960), *citing Mills v. Green*, 159 U.S. 651, 653 (1895). Moreover, an actual controversy and an adversity of interests must exist "at all stages of appellate or certiorari review, and not simply at the date the action is initiated." *Roe v. Wade*, 410 U.S. 113, 125 (1973). Given the settlement between NOPSI and the Council, any decision by this Court on the abstention issue would be purely advisory and would not affect the rights of the parties.

NOPSI seeks to downplay the effect of the "partial settlement" (Pet. at 6 n. 7), arguing that the settle-

ment "did not contemplate or require that any litigation between the parties be dismissed" and that the Council reserved all its rights, including "alleged rights" (*id.*) to review NOPSI's prudence with respect to Grand Gulf and to abrogate certain NOPSI contracts respecting Grand Gulf.

On the first point, the fact that the settlement did not expressly require dismissal of this action is of no consequence because the settlement in fact disposed of the issues before the District Court. On the second point, the answer is that the rights reserved by the Council were not at issue before the District Court and, in fact, are at issue in separate pending litigation.[12] While NOPSI speculates that the outcome of other litigation may later affect the retail rates established pursuant to the settlement, this Court has held that "speculative contingencies afford no basis for our passing on the substantive issues [the petitioner] would have us decide." *DeFunis v. Odegaard*, 416 U.S. 312, 320 n. 5 (1974), *citing Hall v. Beals*, 396 U.S. 45, 49 (1969); *see also Local No. 8-6, Oil, Chem. & Atomic Workers, supra*, 361 U.S. at 370.

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[12] As noted earlier, the Council currently is conducting an investigation of NOPSI's prudence with respect to Grand Gulf. NOPSI challenged the Council's right to conduct such an investigation through a second complaint filed before the Eastern District of Louisiana in *NOPSI II*, but has since amended its complaint so as to limit its objection to the type of remedy the Council could order if it found imprudence. In filing the second complaint, NOPSI specifically alleged that it raised an issue—prudence—not foreclosed by dismissal of the instant action. The other reserved right of the Council alluded to by NOPSI, involving potential abrogation of certain NOPSI contracts, is the subject of litigation pending before a Louisiana court and was not before the District Court in this matter.

For these reasons, this case is moot and the NOPSI petition should, accordingly, be denied.[13]

II. THE FIFTH CIRCUIT'S DECISION TO ABSTAIN WAS PROPER AND CREATES NO CONFLICT AMONG THE CIRCUIT COURTS

The abstention doctrine is based on notions of comity and on the long-standing policy that the federal courts should not ordinarily interfere with state judicial and administrative proceedings.[14] This Court has

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[13] The Court has stated that its normal practice in dealing with a civil case from a federal court that has become moot is to vacate the judgment below and remand with directions to dismiss. *United States v. Munsingwear Corp.*, 340 U.S. 36 (1950). However, respondents urge the Court in this case to follow the course advocated by the government (and perhaps taken by this Court) in *Velsicol Chem. Corp. v. United States*, 435 U.S. 942 (1978), which suggests that in situations where the Court would have denied the petition on the merits (see discussion, *infra*, pp.13-26), it should deny the petition notwithstanding a suggestion of mootness. *Cf. Local 102, International Ladies' Garment Workers' Union v. United States*, 439 U.S. 1070 (1979). Denial of the petition is particularly appropriate here, where mootness results not from events beyond the control of the petitioning party but from a settlement voluntarily entered into by both parties. *Ringsby Truck Lines, Inc. v. Western Conf. of Teamsters*, 686 F.2d 720 (9th Cir. 1982). Alternatively, the Court should deny the NOPSI petition regardless of whether, but for mootness, it would have granted certiorari, because NOPSI had a "full and fair opportunity to litigate" the abstention issue before the District Court and the Fifth Circuit, and has no entitlement to further review by the Supreme Court. See Note, *Collateral Estoppel and Supreme Court Disposition of Moot Cases*, 78 Mich. L. Rev. 946 (1980).

[14] In *Younger v. Harris*, 401 U.S. 36, 44 (1971), this Court referred to these basic principles as "Our Federalism" and noted that the concept represents "a system in which there is sensi-

defined three general categories of abstention, two of which were relied upon by the Fifth Circuit in this case.[15]

The principal thrust of NOPSI's petition is that the Fifth Circuit's decision to abstain on the facts of this case was erroneous and creates a direct conflict with decisions of other circuit courts. With unabashed hyperbole, NOPSI asserts that this abstention issue "may become the major legal battleground in utility regulatory matters during the latter half of the 20th century." (Pet. at 8, footnote omitted).

In truth, the Fifth Circuit's decision to abstain properly focused on the circumstances of this case, which arose under a statutory scheme that explicitly preserves the authority of local regulators over retail electric rates, and involved a local regulator that had not yet had an opportunity to issue a final decision. The court recognized "that abstention in the face of a federal preemption claim is, at a minimum, prob-

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tivity to the legitimate interests of both State and National Governments . . . ." *See also, Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).

[15] *See Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) ("*Burford* abstention"), *Younger v. Harris*, 401 U.S. 37 (1971) ("*Younger* abstention"), and *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941) ("*Pullman* abstention"). The Fifth Circuit relied on *Burford* and *Younger*, but *Pullman* also supported dismissal of the complaint in this case because, but for the settlement, state court review of issues of state law addressed in a final Council decision on NOPSI's rate application might well have eliminated the need to decide NOPSI's claims based on the Supremacy and Commerce Clauses of the Federal Constitution. If the Fifth Circuit's decision to abstain is supportable on any basis, it should be upheld. *See Helvering v. Gowran*, 302 U.S. 238, 245 (1937).

lematical," and expressly declined to intimate "that abstention in the face of a preemption claim under the Federal Power Act may never constitute an abuse of discretion . . . ." (Pet. at A-15, A-17). While other circuits have declined to abstain when confronted with a preemption claim in other circumstances, those cases either have not involved the strong tradition of state control over retail rates preserved by the Federal Power Act or have involved state action directly in conflict with a federal statute.[16] Even circuit courts that have declined to abstain have simultaneously declined to establish a *per se* rule against abstention in the context of a preemption claim.[17]

In short, there exists no hard-and-fast rule for or against abstention in the face of a federal preemption claim, and the lower courts are proceeding on a case-by-case basis to strike a reasonable balance between the interest of federal plaintiffs in a federal forum and the need for deference to the state judicial and administrative process. Plenary review is not warranted here, particularly in view of the guidance recently provided by this Court on the issue of abstention, *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 106 S.Ct. 2718 (1986), and on the underlying issue of preemption, *Nantahala Power and Light Co. v. Thornburg*, 106 S.Ct. 2349 (1986).

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[16] See pp. 21-24, *infra*.

[17] *See, e.g., Baggett v. Dept. of Professional Regulation, Board of Pilot Commissioners*, 717 F.2d 521, 524 (11th Cir. 1983); *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utilities Commission*, 791 F.2d 1111, 1117 (3d Cir. 1986).

A. *Burford* Abstention Was Proper on the Facts of This Case

Burford abstention is appropriate where there exists a comprehensive state regulatory system and where federal interference would disrupt efforts to develop a reasoned response to a matter of legitimate local concern. In finding *Burford* abstention proper in this case, the Fifth Circuit properly accorded significance to the "bright line" that exists between federal and state jurisdiction under the Federal Power Act, denying "state power to regulate a sale 'at wholesale to local distributing companies' and allow[ing] state regulation of the sale at 'local retail rates to ultimate consumers.' "[18] While NOPSI's arguments focused on the potential for disruption of a federal scheme, the Fifth Circuit correctly found that federal court intervention in this case might well "constitute a disruption of a *state* regulatory scheme, for *retail* ratemaking is clearly a field left to the jurisdiction of the states."[19]

With this dual system of state and federal regulation in mind, the Fifth Circuit correctly found that the precepts for *Burford* abstention were satisfied in this case. Pet. at A-19, A-20. First, the regulation of retail rates is a matter of substantial local concern

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[18] *F.P.C. v. Southern California Edison Co.*, 376 U.S. 205, 214 (1964), *quoting Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U.S. 498, 504 (1942).

[19] Pet. at A-16. (emphasis in original). Resolution of the abstention issue presented by this case did not require a determination of the precise limits of the Council's authority to determine retail rates following the FERC's allocation of wholesale costs, for the Council had not yet had an opportunity to rule on the merits of NOPSI's rate application. As the Fifth

and requires local administrative expertise. In the extreme and unusual circumstances of this case, the Council had a legitimate interest in addressing—indeed, a responsibility to address—the threat of "rate shock" to the entire New Orleans economy and population.[20]

Second, the Fifth Circuit also correctly concluded that the Louisiana state courts were fully competent to resolve NOPSI's claims based on actions taken by the Council.[21] The local administrative process provided NOPSI with the right to support its position through testimony and evidence, and further provided

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Circuit stated: "Concerns of federalism lead us to treat challenges to anticipated state action 'with special skepticism.' " Pet. at A-24, *quoting* 17 Wright, Miller & Cooper, Federal Practice and Procedure § 3532.6 (Supp. 1986). Thus, this case, as it confronted the District Court, did not require resolution of issues such as those this Court decided in *Nantahala Power and Light Co. v. Thornburg*, 106 S.Ct. 2349 (1986).

[20] Evidence developed in the Council proceedings showed that the immediate, unmitigated pass-through of Grand Gulf costs would result in the loss of over 6,000 jobs, make it impossible for over 1,100 otherwise qualified families to qualify for mortgage loans, push the income of 1,760 families below the poverty line, reduce state and local tax revenues by over $30 million annually, and otherwise have a profound adverse effect on local manufacturing and service businesses.

[21] *See Alabama Public Service Commission v. Southern Ry. Co.*, 341 U.S. 341, 349-50 (1951), in which this Court found that an injunction should not be granted if there is "adequate state court review of an administrative order based upon predominately local factors . . . ." While the Fifth Circuit focused on the competence of Louisiana courts to address federal claims, and seemed to suggest that no issues of state law were involved, a final Council decision on NOPSI's application almost certainly would have involved novel issues of state utility law.

for direct appeal of the Council's ruling to the Civil District Court for the Parish of Orleans.[22] The result of abstention is not the absence of federal judicial review. Instead, the abstention doctrine requires that a matter be referred first to the local regulator and the local courts for development, review and rectification, with ultimate review, if needed, by this Court.[23]

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[22] The path followed in contemporaneous circumstances by LP&L, NOPSI's sister company, illustrates the proper course of litigation. First, LP&L sought federal injunctive relief to require the Louisiana Public Service Commission ("LPSC") to immediately pass through its Grand Gulf costs. The district court dismissed this action on the basis of the Johnson Act. *Louisiana Power & Light Co. v. Ackel*, 616 F.Supp 445 (M.D. La. 1985). LP&L then commenced a similar action in state court. The state court initially remanded the case to the LPSC for expedited consideration. *Louisiana Power & Light Co. v. Louisiana Public Service Commission*, No. 292,026, Slip Op. at 3 (19th Dist. La., Aug. 29, 1985). When the LPSC flatly refused to recognize the Grand Gulf costs, the state court swiftly found that the LPSC was acting arbitrarily and capriciously and imposed an immediate remedy. *Louisiana Power & Light Co. v. Louisiana Public Service Commission*, No. 292,026 (19th Dist. La., Oct. 9, 1985).

[23] *See, e.g., Nantahala Power and Light Co. v. Thornburg*, 106 S.Ct. 2349 (1986). *See also Robert-Gay Energy Enterprises, Inc. v. State Corporation Commission of Kansas*, 753 F.2d 857, 860 (10th Cir. 1985) ("If adequate state court review of an administrative order based upon predominantly local factors is available, intervention of a federal court is not necessary for the protection of federal rights."); *Browning-Ferris, Inc. v. Baltimore County, Maryland*, 774 F.2d 77, 80 (4th Cir. 1985) (ongoing state administrative proceedings were found to provide "the opportunity for adequate and fair administrative review."); and *Allegheny Airlines, Inc. v. Pennsylvania Public Utility Commission*, 465 F.2d 237, 242 (3rd Cir. 1972), *cert. denied*, 410 U.S. 943 (1973) (federal courts should refuse to intervene when adequate state judicial review is available.)

B. *Younger* Abstention Was Proper On The Facts Of This Case.

The Fifth Circuit properly concluded that abstention was required under *Younger v. Harris*, 401 U.S. 37 (1971), which holds that abstention is appropriate where, absent bad faith, harassment, or a patently invalid state statute, federal claims can be raised and preserved in ongoing state judicial proceedings that concern important state interests.[24] The facts of this case satisfied each element of the three-prong test for *Younger* abstention, as recently set forth in *Ohio Civil Rights* and *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982). Pet. at A-23, A-24.

First, the Fifth Circuit properly found, consistent with this Court's decisions in *Middlesex*[25] and *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 106 S.Ct. 2718 (1986),[26] that an administrative

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[24] Although *Younger* originally was limited to pending state criminal proceedings, this Court's decision in *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 432 (1982), makes clear that the doctrine is applicable to non-criminal proceedings "when important state interests are involved." *See also, Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 106 S.Ct. 2718 (1986).

[25] In *Middlesex*, this Court found that state bar disciplinary proceedings before a "District Ethics Committee" were judicial proceedings within the meaning of *Younger*. 457 U.S. at 432-433.

[26] In *Ohio Civil Rights*, this Court held that an administrative proceeding before the Ohio Civil Rights Commission to determine whether a school was guilty of employment discrimination was a judicial proceeding. 106 S.Ct. at 2723.

proceeding before the Council is judicial because it is appealable to a state court.[27]

Second, for reasons already discussed, the Council's ongoing administrative proceeding clearly involved an "important state interest" in determining the retail rate treatment of Grand Gulf costs. NOPSI now claims that it did not seek to enjoin the Council's right to set retail rates, but NOPSI's request for a full and immediate pass-through of Grand Gulf charges—before any final ruling by the Council—clearly conflicted with the Council's right and obligation to consider such local regulatory issues as rate shock, rate design and phase-in.

Finally, but for the intervening settlement, NOPSI would have had ample opportunity to present its federal claims to the Louisiana Civil District Court following Council action on its rate application. As the Fifth Circuit observed, NOPSI cited "no authority indicating that state review cannot be had of its claims."[28]

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[27] Pet. at A-23. *See United Services Automobile Association v. Muir*, 792 F.2d 356, 365 (3rd Cir. 1986) (a state administrative proceeding is part of its judicial proceeding, for *Younger* purposes, if it provides an adequate opportunity to raise constitutional challenges); *Williams v. Red Bank Board of Education*, 662 F.2d 1008, 1017 (3rd Cir. 1981) (where federal intervention into state administrative proceedings would be substantial and disruptive, and where the state proceedings are adequate to vindicate federal claims and reflect strong and compelling state interests, abstention is proper under *Younger*). *Cf. Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 238 (1984) (*Younger* abstention not appropriate where under the terms of the Hawaii Land Reform Act of 1967, administrative proceedings are not part of, and are not themselves, a judicial proceeding).

[28] NOPSI also argues that abstention typically is not invoked

C. There Is No Per Se Rule Barring Abstention In The Face Of Preemption Claims, And The Circuit Courts Properly Have Addressed The Issue Of Abstention On A Case-By-Case Basis.

In determining that this was an appropriate case for abstention, the Fifth Circuit was fully aware that the circuit courts have not developed a uniform policy either requiring or prohibiting abstention whenever a claim of federal preemption is asserted. Instead, the courts have applied settled abstention jurisprudence to the facts of each case, with particular attention to

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unless the state is the plaintiff in a state court action. As the Fifth Circuit noted, however, this view has been "vigorously criticized." Pet. at A-22 n. 2, *quoting* 17 Wright, Miller & Cooper, Federal Practice and Procedure § 4254 at 216 (Supp. 1986). *See also American Electric Power Co. v. Kentucky Public Service Commission*, No. 85-5129 (6th Cir. Mar. 24, 1986), *petition for cert. filed*, 55 U.S.L.W. 3032 (U.S. July 17, 1986) (No. 86-49). NOPSI further argues that two exceptions to the *Younger* doctrine—bias of the agency and irreparable harm to the federal plaintiff—are applicable in this case. However, the Fifth Circuit found that there was no "bad faith, harrassment [sic] or other exceptional circumstances" sufficient to preclude *Younger* abstention. (Pet. at. A-24). Unlike the situation in *Gibson v. Berryhill*, 411 U.S. 564 (1973), which involved hearings before an administrative board, the members of which had a substantial and personal pecuniary interest in the outcome, there was no suggestion here that the Council or its individual members had any pecuniary interest in the disposition of NOPSI's rate application. Moreover, NOPSI's assertion that the Council is pursuing a plan to take over the company's electric utility business was the subject of a separate federal court action dismissed for lack of ripeness. *Middle South Energy, Inc., et al. v. City of New Orleans*, 800 F.2d 488 (5th Cir. 1986). Finally, this case involved no threat of irreparable injury sufficient to evade *Younger*, and the cases cited by NOPSI on this point (Pet. at 17 n. 20) either involved no abstention issue or were decided before both *Younger* and *Burford*.

the status of the state proceeding and the extent to which it has conflicted with, or is likely to conflict with, the federal scheme. The flexibility and effectiveness of the lower courts in addressing this issue, and the absence of any need for further guidance from this Court, are illustrated by examining not just the results reached by different circuits but also the different results reached by *particular* circuits in differing factual and legal contexts.

For example, in a different factual setting, the Fifth Circuit itself has refused to abstain from intervening in ongoing state administrative proceedings. In *South Central Bell Telephone Co. v. Louisiana Public Service Commission*, 744 F.2d 1107 (5th Cir. 1984), *vacated and remanded on other grounds*, 106 S.Ct. 2884 (1986), the Fifth Circuit found that regulatory action by the Louisiana Commission was "directly contrary" to an order issued by the Federal Communications Commission and that the case was "in no way dependent on local factors or local expertise for [its] resolution." 744 F.2d at 1123. Under these circumstances, abstention was held to be improper.

Similarly, the Fourth Circuit has reached different conclusions, in differing contexts, regarding the propriety of abstaining in the face of a preemption claim. In *Aluminum Co. of America v. Utilities Comm'n of State of North Carolina*, 713 F.2d 1024 (4th Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984), the court abstained under *Burford* from reviewing a state commission rate order involving "important and basic considerations of state policy" (*id.* at 1029), but noted that a refusal to abstain would be required where the "challenged state action clearly conflicts with preemptive federal law." *Id.* at 1030. Subsequently, the Fourth Circuit

upheld a lower court's refusal to abstain where the state commission, in reliance upon a West Virginia statute, created a "direct, facial conflict" with federal law by asserting authority to disapprove an interstate transmission agreement previously approved by the FERC. *Appalachian Power Co. v. Public Service Commission of West Virginia*, 614 F.Supp. 64 (S.D.W.Va. 1985), *aff'd*, 770 F.2d 159 (4th Cir. 1985), *on remand*, 630 F. Supp. 656 (S.D.W.Va. 1986).[29]

Other cases relied upon by NOPSI in an effort to show dissension among the circuits do not involve a statutory regime, such as the Federal Power Act, which carefully preserves the role of state regulation, and these cases establish no *per se* rule for or against abstention.[30]

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[29] Other cases that involved the Federal Power Act or the Natural Gas Act and in which the court refused to abstain likewise involved a direct, facial conflict. *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utilities Commission*, 791 F.2d 1111 (3rd Cir. 1986), (outright denial by Pennsylvania Commission of a utility's request to recover costs it incurred pursuant to FERC-approved tariffs); *Middle South Energy, Inc. v. Arkansas Public Service Comm'n*, 772 F.2d 404 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 884 (1986) (direct attempt by APSC to declare FERC-approved agreements void *ab initio*). NOPSI's contention (Pet. at 8) that *Middle South Energy* involved the "identical abstention issue" presented in this case is specious.

[30] *Family Division of Trial Lawyers v. Moultrie*, 725 F.2d 695 (D.C. Cir. 1984) (no *Younger* abstention because several federal plaintiffs were not parties to state court action in which constitutional challenges would be resolved); *Baggett v. Department of Professional Regulation, Board of Pilot Commissioners*, 717 F.2d 521 (11th Cir. 1983) (no *Younger* abstention where involved tug boat pilotage subject to exclusive federal jurisdiction); *International Brotherhood of Electrical Workers v. Public Service Commission of Nevada*, 614 F.2d 206 (9th Cir. 1980) (*Burford*

Finally, the Sixth Circuit's decision in *American Electric Power Co. v. Kentucky Public Service Commission*, No. 85-5129 (6th Cir. March 24, 1986), *petition for cert. filed*, 55 U.S.L.W. 3032 (U.S. July 17, 1986) (No. 86-49), represents a proper exercise of federal court discretion to invoke *Younger* abstention where an important state interest was involved and the claim of federal preemption could be raised in an ongoing state judicial proceeding. Even *American Electric* bears important factual distinctions from this case, however, since the state commission there had rendered a final decision and the relief sought did not, in the view of the court's majority, implicate questions of state law (regarded by the majority as necessary for *Burford* abstention). Here, the Council had not had an opportunity to rule on the merits of federal *or* state law issues raised by NOPSI's retail application.

III. THE JUDGMENT BELOW ALSO IS SUPPORTABLE ON GROUNDS OF LACK OF RIPENESS AND FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

There exist two alternative grounds upon which dismissal of NOPSI's complaint could properly have been based: lack of ripeness and failure to exhaust administrative remedies. Although these grounds were not relied upon (or, for that matter, directly considered) by the District Court or the Fifth Circuit, they were

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abstention inappropriate for preemption claim based on Labor Management Relations Act, though *Pullman* abstention deemed appropriate); *see also California v. Oroville-Wyandotte Irrigation District*, 409 F.2d 532 (9th Cir. 1969) (federal courts should not intervene where federal preemption claims may be raised in pending state administrative proceedings).

argued by respondents at all stages of the litigation and provide independent support for the judgment of dismissal.

The ripeness doctrine is intended to prevent the federal courts "from entangling themselves in abstract disagreement over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Garner*, 387 U.S. 136, 148-149 (1967). *See also Socialist Labor Party v. Gilligan*, 406 U.S. 583 (1972). The claims asserted by NOPSI in this case clearly were premature because they were presented before the Council had ruled upon the merits of NOPSI's retail rate application. At this early stage, it was impossible to determine whether the Council's actions would actually be in conflict with the FERC's allocation of Grand Gulf expenses at the wholesale level.[31] Moreover, NOPSI did not face "hardship" sufficient under *Abbott* to warrant judicial relief in advance of the Council's determination on the merits, since the Council had afforded interim relief and, as the District Court found (Pet. at. A-45), was "utilizing every feasible alternative to keep NOPSI in a cash positive position."[32]

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[31] *See Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983), in which this Court held that a preemption challenge to a state commission charged with responsibility for determining the adequacy of a nuclear plant's storage capacity was not ripe for review since the state commission had not yet found the plant's capacity to be inadequate.

[32] This Court's recent decision in *Ohio Civil Rights* does not

The doctrine of exhaustion of administrative remedies provides "that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). This prohibition applies with equal force to state administrative proceedings. *See Public Service Commission v. Wycoff Co.*, 344 U.S. 237 (1952); *Illinois Commerce Commission v. Thomson*, 318 U.S. 675 (1943); *Natural Gas Pipeline Co. v. Slattery*, 302 U.S. 300 (1937). In this case, NOPSI improperly sought judicial intervention without first attempting to exhaust its administrative remedies before the Council and, indeed, obstructed the administrative process by depleting the Council's limited resources through an expedited motions practice in federal court. Such disruption of the administrative process is precisely what the exhaustion requirement is designed to avoid, and the wisdom of requiring that administrative remedies be pursued is underscored by the fact that the Council proceedings culminated in a settlement of the issues raised by NOPSI's federal complaint.

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support a finding of ripeness here. There the Court, relying on *Steffel v. Thompson*, 415 U.S. 452 (1974), and *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975), held that the actual filing of an administrative action threatening sanctions in breach of rights protected by the First Amendment presented a ripe controversy, just as threatened criminal prosecutions in violation of constitutional rights presented ripe controversies in *Steffel* and *Doran*. Here, even if NOPSI's preemption claim were regarded as constitutional (contrary to petitioner's position), it did not implicate personal constitutional rights and, as a practical matter, could not have been adjudicated before the scope of the Council's final decision was known.

IV. THE JOHNSON ACT DEPRIVED THE DISTRICT COURT OF JURISDICTION

The Court should deny the petition because this case has become moot, because the District Court properly abstained, and because NOPSI's claims were, in any event, premature. Should the Court grant the petition, however, it would be appropriate to consider whether the Fifth Circuit erred in overruling the District Court's determination that the Johnson Act, 28 U.S.C. § 1342 (1982), barred the exercise of federal jurisdiction in the circumstances of this case. In its first opinion, the Fifth Circuit held that the Johnson Act did not bar jurisdiction because its first criterion—that jurisdiction be based solely on repugnance of the state commission's rate order to the Federal Constitution—had not been satisfied. This holding was not altered by the second opinion, which affirmed the District Court on the issue of abstention.

With due respect, the Fifth Circuit erred when it held that a claim of federal preemption, which ultimately is grounded in the Supremacy Clause, should be treated as a statutory claim rather than a constitutional claim for Johnson Act purposes. Although the court characterized NOPSI's preemption claim as "statutorily-based" (as did NOPSI), at no point did it identify a federal right of action available to NOPSI under any provision of the Federal Power Act.[33] This

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[33] The Fifth Circuit did not decide whether jurisdiction existed under 16 U.S.C. § 825p, which grants jurisdiction to the federal courts to enforce duties created by the Federal Power Act or by orders of the FERC. (Pet. at A-5). The District Court held that § 825p did not support federal jurisdiction because no "duty" was imposed on the Council by either the Act or the FERC's Opinion No. 234. (Pet. at A-42.) A similar result was reached

Court has on occasion characterized preemption claims as statutory where such treatment served a valid policy objective, *Swift & Co. v. Wickham*, 382 U.S. 111 (1965) (claimed invalidity of state statute under Supremacy Clause due to conflict with federal statute deemed not to involve a constitutional challenge requiring three-judge court under 28 U.S.C. § 2281 (repealed 1976)), but treating preemption claims as statutory for purposes of the Johnson Act would effectively nullify that provision's important limitation on federal jurisdiction, especially in view of the prevalence of preemption claims today. While respondents do not believe that this case is a proper vehicle for Supreme Court review of *any* issue raised by the petition, should certiorari be granted the Johnson Act issue could properly be considered and would provide an independent ground for sustaining the judgment below.[34]

CONCLUSION

For all of these reasons the petition should be denied.

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in *Louisiana Power & Light Co. v. Ackel*, 616 F.Supp. 445 (M.D. La. 1985).

[34] The Johnson Act issue is properly raised in this brief in opposition because a cross-petition is not necessary for the prevailing party to defend its judgment on any ground properly raised below, so long as it would not change the judgment. *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n. 20 (1979); *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n. 8 (1977).

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CURIAE

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No. 86-546

In the Supreme Court of the United States

OCTOBER TERM, 1986

NEW ORLEANS PUBLIC SERVICE, INC., PETITIONER

v.

THE CITY OF NEW ORLEANS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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3 pp

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

On October 6, 1986, the Court invited the Solicitor General to file a brief expressing the views of the United States in *American Electric Power Co.* v. *Kentucky Public Service Commission,* No. 86-49. That case presents the question whether, when a public utility brings a suit in federal court against a state public service commission, claiming that the state commission's ratemaking determination violates the "filed rate doctrine" under which a state commission is bound to honor the interstate wholesale rates filed with or fixed by the Federal Energy Regulatory Commission (see *Nantahala Power & Light Co.* v. *Thornburg,* No. 85-568 (June 17, 1986) slip op. 8), it is inappropriate for the federal court to abstain from adjudicating the federal claim.

On October 3, 1986, petitioners in the present case filed a petition for a writ of certiorari that raises a similar question in a somewhat different procedural posture. In our response to the Court's invitation in No. 86-49, which we expect to file promptly, we will offer the Court our views

on whether the question presented in these cases merits the Court's attention at this time and, if so, which, if either, of the two cases presents the question in an appropriate posture for this Court's review. We therefore suggest that the Court postpone its disposition of the petition in No. 86-546 until we have had an opportunity to express the views of the United States in No. 86-49.

It is therefore respectfully submitted that the petition for a writ of certiorari should be considered together with the petition for a writ of certiorari in *American Electric Power Co.* v. *Kentucky Public Service Commission,* No. 86-49.

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